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Utah Supreme Court

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**IN THE UTAH SUPREME COURT**

\_\_\_\_\_  
THE STATE OF UTAH,  
*Plaintiff/Respondent*

v.

RYAN MOOERS AND DARRON LAVEN BECKER,  
*Defendants/Petitioners.*

\_\_\_\_\_  
**REPLY BRIEF OF PETITIONERS ON CERTIORARI REVIEW**

Defendants/Petitioners are not incarcerated

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**IN THE UTAH SUPREME COURT**

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THE STATE OF UTAH,  
*Plaintiff/Respondent*

v.

RYAN MOOERS AND DARRON LAVEN BECKER,  
*Defendants/Petitioners.*

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**REPLY BRIEF OF PETITIONERS ON CERTIORARI REVIEW**

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INTRODUCTION

This reply is “limited to answering any new matter set forth in the opposing brief.” Utah R. App. P. 24(c).

ARGUMENT

**I. The Court of Appeals Erred in Concluding It Lacked Jurisdiction over Petitioners’ Direct Appeal of Their Restitution Orders.**

As explained in Petitioners’ opening brief, under Utah’s statutory scheme, a restitution order is a separate appealable final order over which Utah’s appellate courts have jurisdiction, regardless of the court’s jurisdiction to address the underlying conviction. Pet.Br.12-13. Appellate courts have jurisdiction to address a restitution order because restitution is “an independent component of the sentence decreed in the judgment.” *State v. Dickey*, 841 P.2d 1203, 1207 (Utah Ct. App. 1992); *State v. Allen*, 2000 UT App 340, ¶9, 15 P.3d 110 (“Utah law



provides an independent legal basis for restitution.”). This is because “[n]either subsequent proceedings to determine, nor an order assessing, a specific amount of restitution directly affects” the underlying plea in abeyance agreement. *Sanoff v. People*, 187 P.3d 576, 578 (Colo. 2008) (en banc) (deciding “an order for a specific amount of restitution” is a separate, final appealable order); see *State v. Garner*, 2005 UT 6, ¶17, 106 P.3d 729 (holding that a non-material modification of a restitution amount is not a “new and final judgment for purposes of appealing *the underlying merits of a criminal conviction*” (emphasis added)); *State v. Abbot*, 2000 UT App 342U, \*1 (unpublished) (per curiam) (noting that timely appeal from restitution order does not constitute timely appeal from underlying judgment of conviction and sentence).

Petitioners cite Utah’s case law and statutory scheme to support their argument that restitution orders are final appealable orders in the plea in abeyance context—independent of the final judgment of conviction. See Pet.Br.Pt.I. The State concedes that a defendant has the right to separately appeal a restitution order but attempts to limit this right to a particular “type” of defendant. See Resp.Br.22-26. It argues that only a “convicted” defendant has the right to directly appeal a restitution order because “[o]therwise,” the time the court is permitted to assess the restitution amount would cause the defendant’s appeal to be delayed “forc[ing him] to wait . . . before seeking review of [his] conviction.” Res.Br.24 (asserting it “‘makes sense’ to permit a convicted defendant to immediately proceed to direct appeal” because the delay in

determining the restitution amount may be “up to one year after sentencing”—beyond the jurisdictional time limit for filing an appeal). The State contends these concerns do “not apply in the plea in abeyance context . . . because a recipient . . . has not been convicted, [so] there is no conviction for him to appeal.” *Id.* at 25.

But, as argued in Petitioners opening brief, “the rationale behind exercising independent jurisdiction over criminal convictions and criminal restitution is every bit as strong when the plea is held in abeyance until successful payment of restitution” where a defendant also faces significant delays and errors in the award of restitution amounts while being threatened with criminal sanctions including incarceration if he fails to pay but is unable to seek direct review. Pet.Br.13-15; *see also Garner*, 2005 UT 6, ¶¶15-16 (distinguishing the separate appellate timeline for criminal restitution and criminal conviction so as not to “significantly delay[]” “a defendant’s right to appeal in criminal cases”).

The State argues the imposition of the specific amount of restitution does not differ from “any other condition [imposed in the] plea in abeyance agreement,” therefore it does not “defy logic” to deny a defendant the right to directly appeal until after the conviction and sentence are imposed. Res.Br.25-26. The State’s argument ignores the distinction between those “other conditions” which are set forth when the plea in abeyance agreement is entered and the later determination of a specific amount of restitution which can and often does remain unknown long after entry. Res.Br.25-26; Utah Code §77-38a-302(2)(b)

(2013) (prior statute gave the court one year from sentencing to make restitution determination); Utah Code §77-38a-302(2)(b) (Supp.2016) (statute amended to eliminate the one-year jurisdictional deadline). Unlike the “other conditions” imposed as part of a plea in abeyance which are known and subject to challenge, an erroneously awarded restitution amount could never be challenged until a violation occurs.

For example, the State cites “paying child support” as an example of “possible common conditions of a plea in abeyance” agreement that could “require the defendant to pay substantial monthly sums” but would not be subject to a direct appeal. Res.Br.26n.6. But this is not true. The plea in abeyance statute allows the district court to “order that the defendant comply with any other condition which could have been imposed as conditions of probation upon conviction and sentencing for the same offense.” Utah Code §77-2a-3(5)(d). One of the conditions under the probation statute “the court may require” is that the defendant “provide for the support of others for whose support the defendant is legally liable.” Utah Code §77-18-1(8)(a)(iii); *see also* Utah Code §78B-12-101 (Utah Child Support Act), -205 (listing rebuttable support guidelines court must establish when calculating each parents’ obligation); -202 (listing relevant factors court must consider to establish child support when sufficient evidence exists to rebut the child support guidelines in subsection -205).

For the payment of child support to be imposed as a condition of probation or a term of a plea, the condition must either be based on an existing child

support order or a separate order imposed in compliance with the Utah Child Support Act's statutory requirements. *See* Utah Code §78B-12-202(4) ("When no prior court order exists, the court shall determine and assess all arrearages based upon the guidelines described in this chapter."). Child support orders imposed in accordance with these required guidelines or factors are final orders that can be directly appealed within the jurisdictional timeframe established by rule. *See* Utah R. App. P. 4(a); Utah Code §78B-12-110 (stating "[a]ppeals may be taken from orders and judgments under this chapter as in other civil actions"). Thus, a defendant has notice of the amount of child support owing before the plea in abeyance is entered and does not face the possibility of an unknown "substantial monthly sum" being imposed as a condition while being denied the right to directly appeal the order initially establishing this financial obligation.

In contrast, under the State's theory, the restitution amount awarded in a plea in abeyance context would not be subject to challenge when it is imposed. According to the State, the court can assign the obligation to pay restitution as a condition when the plea in abeyance is entered without giving the defendant notice of the specific amount of restitution that he will be responsible for paying until some later date. The defendant would be responsible to pay this unknown amount of restitution or face criminal sanctions or incarceration while having no right to directly appeal an erroneous award amount or withdraw his plea. *See* Utah Code §77-13-6(2)(b) (defendant has 30-day jurisdictional time limit to move to withdraw a plea held in abeyance). It would also render the defendant's right

under the statute to dispute the amount of restitution imposed meaninglessly. See *State v. Toole County*, 2002 UT 8, ¶10, 44 P.3d 680 (When interpreting statutes, the Court “seek[s] ‘to render all part [of the statute] relevant and meaningful,’ and . . . ‘avoid interpretations that will render portions of a statute superfluous or inoperative’”).

Contrary to the State’s argument, restitution imposed as part of a plea in abeyance is necessarily a separate appealable final order for these agreements to comply with constitutional and state law requirements that a defendant facing punishment have “a full understanding of what the plea connotes and of its consequences.” *State v. Gibbons*, 740 P.2d 1309, 1312 (Utah 1987); see also U.S. Const. amend. XIV, §1 (ensuring due process); Utah Const. art. I, §7 (same); *State v. Beckstead*, 2006 UT 42, ¶10, 140 P.3d 1288 (recognizing that the trial court must ensure that the defendant understands the rights he is giving up and that he has voluntarily waived known rights); *State v. Visser*, 2000 UT 88, ¶ 11, 22 P.3d 1242 (stating that the trial court must ensure that “defendants know of their rights and thereby understand the basic consequences of their decision to plead guilty”); *State v. Gibson*, 2009 UT App 108, ¶15, 208 P.3d 543 (acknowledging “defendant has all the due process rights inherent in [a restitution] hearing and also has the right to appeal the resulting determination”).

Under Utah law, restitution is a direct consequence of a plea to which defendant must be sufficiently informed. See, e.g., *State v. Miller*, 2007 UT App 332, ¶19, 170 P.3d 1141 (recognizing that restitution serves many purposes

including rehabilitation and deterrence); *State v. Cabrera*, 2007 UT App 194, ¶8, 163 P.3d 707 (recognizing that restitution serves as criminal punishment and rehabilitation); *see also* Utah Code §§77-2a-2(4) (stating plea in abeyance agreement shall include full detailed recitation of requirements and conditions); 77-38a-102(7) (specifying plea agreement must “set[] forth the special terms and conditions . . . upon which the defendant will enter a plea of guilty”); -102(9) (specifying plea in abeyance to contain the “specific conditions” which the defendant must comply); -102(10) (defining “plea in abeyance agreement” as “an agreement . . . setting forth the specific terms and conditions upon which, following acceptance of the agreement by the court, a plea may be held in abeyance”); Utah R. Crim. P. 11(e)(6).

Adequate notice of the amount of restitution that a defendant will be obligated to pay is a critical requirement a defendant must have before entering into a plea in abeyance. The importance of this requirement is reflected in the plea in abeyance statute itself which mandates that acceptance of an agreement “be done in full compliance with the provisions of Rule 11, Utah Rules of Criminal Procedure.” Utah Code §77-2a-3(1)(a). Rule 11 requires that if the plea “is a result of a prior plea discussion and plea agreement” the court must determine “what agreement has been reached.” Utah R. Crim. P. 11(e)(6). At the time of disposition the agreement must be clear, meaning significant terms and conditions are explicit and unambiguous. *See United States v. Burns*, 160 F.3d 82, 83 (1st Cir. 1998) (stating “significant plea-agreement terms should be stated

explicitly and unambiguously so as to preclude their subsequent circumvention by *either* party”); *State v. Mora*, 2003 UT App 117, ¶19, 69 P.3d 838 (stating “[a]ny omissions or ambiguities in the affidavit must be clarified during the plea hearing, as must any uncertainties raised in the course of the plea colloquy”) (cite omitted).

The importance of a defendant receiving sufficient notice of the restitution amount is also expressly reflected in the plain language of the restitution statute. According to the statute, parties in a criminal case may enter into a plea agreement when restitution is in dispute, and the trial court may resolve restitution issues at a separate hearing after the plea. *See* Utah Code §§77-38a-203(2)(c); 77-38a-302(4). Also, the statute requires the prosecutor at the time of the plea to reveal the amount in actual or estimated restitution that the State has calculated against the defendant using the criteria set forth in the statute. Utah Code §77-38a-202(1)-(2).

Subsection (1) states, “At the time of entry of . . . any plea disposition of a felony or a class A misdemeanor,” the prosecutor shall divulge “the actual or estimated amount of restitution specified as part of the plea disposition.” Utah Code §77-38a-202(1)(b), -202(2) (in computing actual or estimated restitution, the prosecutor shall use criteria set forth in section 77-38a-302); *see also* §77-38a-201 (requiring law enforcement to assess claims of restitution when investigating criminal conduct); §77-38a-102(8) (defining plea disposition). In addition, the prosecutor must disclose “whether or not the defendant has agreed

to pay the restitution specified as part of the plea disposition.” *Id.* at §77-38a-202(1)(c); *see also State v. Bickley*, 2002 UT App 342, ¶9, 60 P.3d 582 (recognizing “a defendant cannot be ordered to pay restitution for criminal activities for which the defendant did not admit responsibility, was not convicted, or did not agree to pay restitution”).

Thereafter, if the defendant “objects to the imposition, amount, or distribution of the restitution, the court shall allow the defendant a full hearing on the issue.” Utah Code §77-38a-302(4), *see also* §77-38a-203(2)(c). This evidentiary hearing will likely be held at a later date where the court will consider factors relevant to the victim and to defendant’s financial resources and ability to pay. Utah Code §77-38a-302(5). To avoid rendering a defendant’s right to challenge an erroneous restitution amount meaningless, this provision must be interpreted as further support that restitution orders are necessarily separate appealable final orders, independent of the underlying plea in abeyance agreement. *See Lyon v. Burton*, 2000 UT 19, ¶17, 5 P.3d 616 (“The plain language of a statute is to be read as a whole, and its provisions interpreted in harmony with other provisions in the same statute.”).

Reading the applicable statutes as a whole supports Petitioners’ argument that “Utah law provides an independent legal basis for restitution,” independent of the underlying plea in abeyance agreement, giving a defendant the right to directly appeal such orders. *Allen*, 2000 UT App 340, ¶9; *State v. Turnbow*, 2001 UT App 59, ¶13n.4, 21 P.3d 249 (noting in plea in abeyance case “that there



is statutory authority to enforce a restitution order separately from probation orders.” (citation omitted)); *see also* Utah Code §§77-2a-3(5)(d) (allowing court to order a defendant to comply with “any other conditions which could have been imposed as conditions of probation”), -4) (permitting court to “require the Department of Corrections to assist in the administration of the plea in abeyance agreement as if the defendant were on probation to the court under Section 77-18-1”); §§77-18-1(1) (incorporating plea in abeyance agreements), -8(ix) (condition of probation may include the defendant to “make restitution . . . in accordance with” the restitution statute).

The plea in abeyance statute requires that “an order that the defendant pay restitution to the victims of the defendant’s actions [be determined] as provided” in the Crime Victims Restitution Act. Utah Code §§77-2a-3(5)(b). Similarly, the restitution statute expressly requires that restitution imposed pursuant to a plea in abeyance be decided under its mandated criteria. *See* Utah Code §77-38a-102(1)(b) & (c) (defining “conviction” to include “a plea of guilty” and “a plea of no contest”); -102(9) (defining a plea in abeyance in part as “an order by a court . . . accepting a plea of guilty or of no contest”). For the purposes of restitution, pleas in abeyance fall under the definition of “conviction” as that term is used in the statute. *Id.* The restitution statute provides that “[w]hen a defendant is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution . . . .” Utah Code §77-38a-302(1). Thus, in accordance with the

statute's plain language, restitution imposed under a plea in abeyance is "an independent component of the sentence decreed in the judgment" and is a separately appealable final order over which Utah's appellate courts have jurisdiction. *Dickey*, 841 P.2d at 1207.

The Colorado Supreme Court's explanation of the difference between the finality of "a subsequent determination of the amount of restitution owed by a defendant, as distinguished from an order simply finding [the defendant] liable to pay restitution" is instructive. *Sanoff*, 187 P.3d at 578. Like Utah, Colorado law views restitution as "a component of a defendant's sentence" and requires the sentencing court to determine restitution. *People v. Hill*, 296 P.3d 121, 123 (Colo. App. 2011); *compare* Utah Code §77-38a-302. Under prior law, Colorado's sentencing court was required "to impose a restitution obligation on the defendant and to include the amount of restitution . . . ." *People v. Johnson*, 780 P.2d 504, 506 (Colo. 1989) (en banc). For the purposes of finality, when the court imposed the specific amount of restitution owed it became part of the sentence and judgment of conviction and appealable. *Id.* at 508 (requiring under Colorado's former statutory scheme that court "set the amount of restitution at the time of sentencing").

In 2000, Colorado's legislature "altered the prior [restitution] scheme by relieving the sentencing court of the obligation to set the *amount* of restitution at the time of imposing sentence . . . ." *Sanoff*, 187 P.3d at 578 (emphasis added). "While the statute continues to require that every order of conviction include

*consideration of restitution*, it now expressly permits the sentencing court to merely order that the defendant be obligated to pay restitution and postpone a determination of the specific amount of restitution.” *Id.* (emphasis added) (change in statutory requirement “clearly distinguishes an order assigning liability for restitution from a determination of the amount of restitution for which the defendant is liable.”).

Eliminating the requirement means “that the amount of the defendant’s liability no longer [is a] required component of a final judgment of conviction.” *Id.* “[A] subsequent determination of the amount of restitution owed by a defendant, as distinguished from an order simply finding her liable to pay restitution, has been severed from the meaning of the term ‘sentence’ as contemplated by [the criminal rules of procedure] and therefore from [the] judgment of conviction.” *Id.* Thus, when the court imposes an order for a specific amount of restitution it is “a separate, final judgment . . . [and] is itself an appealable order.” *Id.* (trial court is “not divested of jurisdiction to proceed to set an amount of restitution by an ongoing appeal of the defendant’s conviction”); *Hill*, 296 P.3d at 123 (“Because restitution is a component of a defendant’s sentence, the defendant may directly appeal a restitution order.”); *People v. Henson*, 307 P.3d 1135 (Colo. App. 2013) (defendant separately appealed order of restitution amount imposed as part of a deferred judgment); *People v. Leonard*, 167 P.3d 178 (Colo. App. 2007) (unpublished) (same); *State v. V.O.*, 193 Wash.

App. 1041 (2016) (unpublished) (same); *State v. Roman*, 164 Wash. App. 1042 (2011) (unpublished) (same).

Similarly, Utah law recognizes a restitution order as a separate appealable final order over which Utah's appellate courts have jurisdiction, regardless of their jurisdiction to address the underlying merits of the criminal conviction. *E.g., State v. Birkeland*, 2011 UT App 227, ¶¶ 4-6, 258 P.3d 662 (defendant pleaded no contest and appealed only the restitution order). Where defendants enter into plea in abeyance agreements but do not learn of the specific amount of restitution they will be held liable for paying until some future date well beyond the statutory deadline to file an appeal or withdraw the plea, the order is itself directly appealable. The court of appeals incorrectly held that a final restitution order is not directly appealable in the plea in abeyance context.


#### CONCLUSION

For the reasons above, and those more fully set forth in the opening brief, Petitioners respectfully request that this Court reverse the court of appeals' jurisdictional holding dismissing their appeals.

SUBMITTED this 6<sup>th</sup> day of October, 2016.



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CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains less than 7,000 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Times New Roman 13 point.

  
\_\_\_\_\_  
DEBRA M. NELSON

CERTIFICATE OF DELIVERY

I, DEBRA M. NELSON, certify that I have caused to be hand-delivered the original and nine copies of the foregoing brief to the Utah Supreme Court, 450 South State, 5th Floor, Salt Lake City, Utah 84114-0230, and three copies to the Utah Attorneys General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 6<sup>th</sup> day of October, 2016.

  
\_\_\_\_\_  
DEBRA M. NELSON

DELIVERED this \_\_\_\_ day of October, 2016.

\_\_\_\_\_